TAIPAN FOCUS SDN BHD

v.

BAIDURI PJ SDN BHD

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[ORIGINATING SUMMONS NO: MT1-24-1528-2003]
27 MAY 2005

LAND LAW: *Caveat - Private caveat - Application for removal - Principles applicable - Whether plaintiff an aggrieved party - Whether caveatable interest existed - Whether caveat ought to be removed*

The plaintiff, who had purchased certain land ('the said land') pursuant to a sale and purchase agreement, thereafter entered into a joint venture agreement ('JVA') on 8 August 2001 with the defendant, *inter alia*, to develop the said land. This was a short-lived JVA as, on 8 March 2002, the plaintiff and defendant mutually consented to terminate it due to the existence of a caveat filed earlier on the said land by a third party. After executing the JVA, the defendant, to ensure self-preservation, had promptly filed a caveat on the said land. As the JVA had come to an end, and regardless of the other third party caveat, the plaintiff thereupon requested the defendant to remove its caveat. The plaintiff contended that it would be prevented from dealing with the said land unless the private caveat lodged by the defendant was lifted *ie*, the plaintiff was aggrieved by the private caveat. The plaintiff also averred that the JVA to develop the said land and share the proceeds of the development did not confer any caveatable interest in favour of the defendant, let alone the fact that the JVA had been terminated. The issues requiring determination were whether the plaintiff was an aggrieved party and whether a JVA, debt-related claims or a multiplicity of proceedings could confer a right to a caveator to file a private caveat.

Held (granting the plaintiff's application):

[1] On the facts, the plaintiff was currently developing the said land together with some other land, and as at 15 April 2003, a sum of RM55,000,000 had already been spent on that development. Paragraph 7 of encl. 6 fortified further the necessity of the caveat being lifted since the freed land would be needed to ensure that the strata title could be issued subsequently. To complement the above two grounds of the plaintiff, which were financial losses-related grievances to qualify as an aggrieved person, was the admitted fact that the plaintiff had bought the said land. Although

that sale was facing a pending legal suit, the eventual outcome was irrelevant as the decision as regards the present case must be focussed and restricted only to the facts and law before the court now. That impugned caveat was indisputably the source of all the legal grievances of the plaintiff. Any delay in removing that caveat would prejudice and affect the plaintiff's interest, which would directly cause the latter to suffer loss and damages. Hence, the plaintiff had satisfied the issue of *locus standi*, in that it qualified as an aggrieved party. (pp 78 d-h & 79 b)

[2] Enclosure 3 of the defendant's affidavit in reply at para. 6.8 averred that the plaintiff had failed to pay the defendant no less than RM2,100,000 in monetary terms, termination fees and other payments of compensation. With the JVA terminated, the nexus of the parties had been snipped off, leaving the substratum of the defendant's case in the writ to be debt-related only. It was sufficient to say that a mere debt, being monetarily-based, did not fall within the purview of an interest in land, and hence fell outside the realm of caveatable interest. Such a debt did not relate to the said land. (p 80 g)

[3] It had to be appreciated from the point of view of the plaintiff that, unless it eliminated all the prohibitions over the land, whether caveat by caveat or case by case, it would never be able to successfully exploit the land in any manner. The plaintiff's action, which also qualified as a mitigation action for future reference, did not contravene any known law either. Moving on from there, as the defendant had failed to pass the first hurdle ie, the issue of caveatable interest, it was thus unnecessary for this court to consider the other hurdles, namely the issues of "serious question to be tried" and "balance of convenience". Therefore, the caveat ought to be lifted. (p 82 e-g)

Case(s) referred to:

Chiew Sze Sun v. Muthiah Chettiar [1983] CLJ 39; [1982] CLJ (Rep) 423 HC ***(foll)***

Chng Sin Poey v. Quek Lian Meng [1979] 1 MLJ 98 ***(refd)***

Cook v. Southern BC [1990] 2 WLR 61 ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 2 MLJ 212 ***(refd)***

Ex p Sidebotham [1880] 14 Ch D 485 ***(refd)***

Janab's Key to Practical Conveyancing, Land Law and Islamic Banking; Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1970] 1 MLJ 145 ***(refd)***

Jivanjit Kaur Sohan Singh v. Amar Singh Sunder Singh [2000] 4 MLJ 55 ***(refd)***

Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150 SC ***(refd)***

Kundang Lakes Country Club Bhd v. Garden Masters (M) Bhd [1999] 2 CLJ 633 CA ***(refd)***

Macon Works & Trading Sdn Bhd v. Phang Hon Chin [1976] 2 MLJ 177 ***(refd)***
Nanyang Development v. How Swee Poh [1970] 1 MLJ 145 ***(refd)***
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLJ 224 ***(refd)***
Pacline (M) Sdn Bhd v. Tan Wee Yong [1994] 4 CLJ 1027 HC ***(refd)***
Sharifah Mastura Tuanku Ibrahim v. Wan Aziz Ibrahim [1994] 1 CLJ 298 HC ***(refd)***
Toko Palayakat Jamal (M) Sdn Bhd v. Soon Seng Company Sdn Bhd [2004] 3 CLJ 32 CA ***(refd)***
Trans-Summit Sdn Bhd v. Chun Nyook Lin [1996] 3 CLJ 502 CA ***(refd)***
Wu Shu Chen v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(foll)***

Legislation referred to:
National Land Code, ss. 281, 323(1), 325(1), 326(1), 327, 328(1), 330(5), 417

For the plaintiff - Cik Ambiga (Lilian Wee with her); M/s Sreenevasan
For the defendant - Datuk Pathmanathan; M/s R Sivagnanam & Assoc

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar J:

A company called Harta Sekata Sdn Bhd (hereinafter referred to as Harta), is the registered proprietor of a parcel of land held under H.S (D) 114559, PT No 243, Bandar Petaling Jaya District of Petaling and State of Selangor (hereinafter called the land). Subsequently a deed of settlement was executed on 30 March 1998 between Harta and one Soo Sin Lian @ Su Ken Sin (hereinafter referred to as Soo), which allowed him, in gist, to dispose of the land but subject to certain manners and conditions. As Harta failed to settle a sum owed to Soo within the stipulated time, the latter entered into a sale and purchase agreement dated 10 October 1998 with the plaintiff.

Having executed the S&P with Soo, the plaintiff thereafter entered into a Joint Venture Agreement (JVA) on 8 August 2001 with the defendant, *inter alia* to develop the said land. This was a short-lived JVA, as on 8 March 2002 the plaintiff and defendant mutually consented to terminate it, due to the existence of a caveat filed earlier on the said land by a third party. After executing the JVA, the defendant, to ensure self preservation, had promptly filed a caveat on the said land. That meant there were now two caveats over the land. As the JVA had come to an end, and regardless of the other third party caveat, the plaintiff thereupon requested the defendant to remove its caveat.

Any private caveat may be cancelled, lifted or terminated under several circumstances. Under s. 325(1) of the NLC, it may be withdrawn at any time at the instance of the very person who entered that caveat or by his personal representative. After receiving the written notice of that withdrawal intention, the registrar shall cancel the entry of the caveat. The latter will thereafter notify the person or body in whom the land or interest is vested regarding that withdrawal. In another situation as envisaged by s. 326(1) of the NLC, where any person whose land or interest has been bound by a private caveat, may write to the registrar to have that caveat removed. That officer thereafter shall serve a notice of that intended removal on the caveator, who thereafter on receipt of that notice apply to the court, to extend the period as stated in it. If the caveator does nothing, or fails to get that extension, on expiry of the period of one month from the date of service the registrar shall cancel that caveat. He shall also make the necessary endorsement on the register document of title. Naturally if an extension is granted the removal is not carried out until the expiry of that extended period. As a form of clarification, s. 326(1) may only be utilized by the registered owner or a person with registered interest which would include a registered chargee, whilst s. 327 of the NLC has been enacted for other categories of persons wanting redress.

The above two scenarios are not too dissimilar to an application made by an aggrieved person under s. 327(1) of the NLC who desires that the caveat be removed. Under this provision, any aggrieved person or body aggrieved by the existence of a private caveat may at any time, apply to the court for an order of its removal. In the event I were to grant the application, pursuant to s. 417 of the same Code I am statutorily empowered to direct the registrar to do all such things as may be necessary to give effect to that order relating to the impugned land. The consequential order in a caveat removal application normally is the removal of the offending caveat, by its prompt cancellation, and as in the earlier scenario thereafter makes an endorsement in the register document of title. Under s. 328(1) of the NLC, a private caveat if not withdrawn or removed shall lapse at the expiry of six years, from the time it was entered. Thereafter the administrative acts required to be carried out by the registrar will be proceeded with.

Returning to the mainstream, the plaintiff had canvassed that by reason of the lodgment of the private caveat filed by the defendant, and unless it was lifted, it as a beneficial owner would be prevented from dealing with the said land. In brief the plaintiff was aggrieved by the private caveat. As far as the plaintiff was concerned, the JVA to develop the said land and share the proceeds of the development of the land did not confer any caveatable interest in favour of the defendant, let alone that the JVA had been terminated. On that premise the plaintiff wanted the caveat out.

Before me, a few pertinent issues were discussed, amongst them being whether the plaintiff was an aggrieved party, whether a JVA, debt related claims or a multiplicity of proceedings filed in court could confer a right to a caveator to file that caveat. As per the intitulement, the application was pursuant to s. 327(1) of the National Land Code and it reads:

> Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

A perusal of the above provision shows that, to qualify to be entitled to remove a caveat, that interested person must be clothed with an ingredient ie, he is an aggrieved person or body. In simple words, he has to have a *locus standi.* He has to have a right with sufficient interest or the legal capacity to apply for the removal of the caveat. By the promulgation of a wide and not statutorily demanding term of "any person or body aggrieved", an interested party is not statutorily restricted or required to have a registrable interest that includes a registered chargee. Section 326(1) has taken care of posers that relate to litigations premised on registrable rights. Needless to say, if a person or body has a caveatable interest he qualifies as an aggrieved person, as the requirement to fall within the category of such interested persons is more stringent. Naturally an aggrieved person may not automatically have a caveatable interest. Of course if the applicant is all of the above the road is less strewn with obstacles.

By analogy under s. 327(1) even a lien-holder, a person who does not have a registrable interest, may be an aggrieved person. This is so as under s. 281 of the NLC any proprietor of land or any lessee may deposit as security for a loan his issue document of title, or as the case may be, duplicate lease with any other person. That depositee may later apply to the registrar under s. 330 of the Code for a lien-holder's caveat in respect of the relevant land or lease. With its registration the depositee is protected as he is now entitled to a lien over the land or lease. Under s. 330(5) a lien-holder's caveat shall, so long as it continues, have the like effect as that of a private caveat. In the case of *Chiew Sze Sun v. Muthiah Chettiar* [1982] CLJ 39; [1982] CLJ (Rep) 423 Abdul Razak J had occasion to remark as regards the terminology of 'aggrieved person' in the NLC in the following manner:

> The section clearly shows it does not require an applicant to be a person who has a registrable interest to qualify him to apply as the respondent contends. It needs only be a person aggrieved by the existence of a private caveat and clearly a lien-holder is one although he has no registrable interest, as long as he has an interest, a grievance.

In *Wu Shu Chen v. Raja Zainal Abidin bin Raja Hussin* [1997] 3 CLJ 854 per Mokhtar Sidin JCA, had succinctly stated, as reflected under holding (2), the following:

> The word "aggrieved" must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

Taking a leaf from the above cases, and alluding also to the case of *Ex p Sidebotham* [1880] 14 Ch D 485 (see also *Cook v. Southern BC* [1990] 2 WLR 61), after giving the word its ordinary meaning, an aggrieved person in the current context thus may be construed as a party that has suffered a legal grievance, which led to him being wrongfully deprived, refused or wrongfully affected of his right over the land, caused by the private caveat. In this case, how could the plaintiff not be an aggrieved party when it was unable to make deals which relate to the land, transacted earlier with Soo? A11 (encl. 2) in crystalline terms showed that the plaintiff was currently developing the impugned land together with some other land, and as at 15 April 2003 a sum of RM55,000,000 had already been spent on that development. Paragraph 7 of encl. 6 fortified further the necessity of the lifting of the caveat, as the freed land would be needed to ensure that the strata title could be issued subsequently.

To complement the above two grounds of the plaintiff, which are financial losses-related grievances to qualify as an aggrieved person, is the admitted fact found at para. 3.4(v) of encl. 3 that the plaintiff had bought the impugned land. What is left to be paid is the balance of the purchase price. Agreeably that sale is facing some pending legal suit, but as far as I am concerned at this stage, the eventual outcome of that pending suit is irrelevant. The decision as regards the case before me must be focused and restricted only to the facts and law before me now, and not be influenced by some speculative future events. What is important is what is.

To wind up this poser, that impugned caveat thus was indisputably the source of all the legal grievances of the plaintiff. Any delay in removing that caveat would prejudice and affect the plaintiff's interest, which would directly cause the latter to suffer loss and damage. Taking the matter a step further, and applying the above definition to the argument of the defendant, I am thus unable to acquiesce to the latter's submission that to qualify as an aggrieved

person, the plaintiff must have paid in full the purchase price first. To demand the latter requirement, not only would militate against the liberal requirements of Parliament, but tantamount to importing ingredients never in the mind of the legislators.

Once that *locus standi* issue has been satisfied by the plaintiff, in that it qualifies as an aggrieved party, the onus now shifts to the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing the caveat. Without the necessity of a discourse, to ensure that *status quo* be maintained, the caveator must by necessity establish first that it is a person who is entitled to obtain a title or in possession of a caveatable interest. From here the caveator must move on to the next stage of proving that its claim to that caveatable interest does raise a serious question to be tried, and on a balance of convenience that caveat ought to be maintained, awaiting the disposal of a pending action. All these requirements must be fulfilled, as one without the other is insufficient eg, merely having a serious issue to be tried does not ensure certainty of *status quo* (*Janab's Key to Practical Conveyancing, Land Law and Islamic Banking; Nanyang Development (1966) Sdn Bhd v. How Swee Poh* [1970] 1 MLJ 145; *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] 1 CLJ (Rep) 150; *Toko Palayakat Jamal (M) Sdn Bhd v. Soon Seng Company Sdn Bhd* [2004] 3 CLJ 32; *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212; *Sharifah Mastura bte Tuanku Ibrahim v. Wan Aziz Ibrahim* [1994] 1 CLJ 298).

Any potential caveator wishing to lodge a caveat is required to file a prescribed form, stating the nature of the claim on which the application is based, and the scope of the caveat. The necessary from will be supported by a statutory declaration made by the caveator, or by his solicitor verifying that claim. The registrar on receipt of this application merely exercises an administrative function, and hence does not concern itself with the validity of the claim, let alone reject the lodgment application (*Nanyang Development v. How Swee Poh* [1970] 1 MLJ 145; *Ong Chat Pang & Anor v. Valliappa Chettiar* [1971] 1 MLJ 224). The court in *Chng Sin Poey v. Quek Lian Meng* [1979] 1 MLJ 98 on the other hand, had opined that such an application could be rejected, if it did not conform with the form *(Hj. Salleh Hj. Buang, Malaysian Torrens System).*

The prohibitive effect of a caveat is quite frustrating to an aggrieved person, who wishes to deal with the impugned land, as that caveat acts like an injunction. What frustrates the plaintiff further here is that, even though the JVA has been terminated, and the defendant has no registrable interest over the land, the caveat system which protects non-registrable interests, has been exploited by the latter. As clarified above on receipt of a caveat application,

which has been properly filled, the registrar is duty bound to carry out his administrative function. The caveat is allowed to be lodged not on the premise of the validity of the interest claimed but on the claim of an interest within the category of caveatable interests. As it were, once that caveat is registered unless removed, the land is restrained from being a subject of effective deals pending the determination by the court of the caveator's claim. The validity of that interest becomes highly relevant only when it is challenged, as in this case when an action has been filed in court to have that caveat removed. Needless to say, an aggrieved party who has suffered loss or damages as a result of the wrongful entry of that caveat may file an action for compensation, and if successful will be entitled to damages.

I now refer to the specific provision. Under s. 323(1) of the NLC a caveat may be lodged by any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest, any person or body claiming to be beneficially entitled under any trust affecting any such land or interest, and lastly the guardian or next friend of any minor claiming to be entitled as mentioned earlier of any person beneficially entitled under any trust. To date courts have been giving s. 323(1) a rather wide and liberal interpretation, as it has been legislated for the protection of alleged as well as proved interest (*Macon Works & Trading Sdn Bhd v. Phang Hon Chin* [1976] 2 MLJ 177). In brief only a person with a caveatable interest, a term coined by courts, may lodge a caveat. Whether a caveator has that caveatable interest will depend on the quality of the evidence adduced during the trial, and which cannot, but must point to land-related interest. That kind of interest may be better understood by supplying some hypothetical examples, in the like of an option to purchase the land within a certain period, the existence of a valid agreement of sale of the land or even where an entity eg, a bank has an instrument of charge in registrable form.

Enclosure 3 of the defendant's affidavit in reply at para. 6.8 avers that the plaintiff has failed to pay the defendant no less than RM2,100,000 in monetary terms, termination fees and other payments of compensation. With the JVA terminated, the nexus of the parties has been snipped off, leaving the substratum of the defendant's case in the writ to be debt related only. From the preceding paragraphs' analysis, suffice to say that a mere debt being monetarily based does not fall within the purview of an interest in land, and hence falls outside the realm of caveatable interest. Such debt does not relate to the land.

A prognosis of the above two preceding paragraphs *vis-a-vis* the examples also show that a JVA falls outside the ambit of the term of caveatable interest. It is beyond dispute that a JVA whenever executed is primarily for monetary purpose ie, for profit and not by reason of any interest over the land. The land is the means to the money. Or the money is the actual interest. It is thus not surprising that there are one too many cases which establish that a JVA does not confer an applicant the right to file a caveat (*Pacline (M) Sdn Bhd v. Tan Wee Yong* [1994] 4 CLJ 1027; *Jivanjit Kaur a/p Sohan Singh v. Amar Singh a/l Sunder Singh* [2000] 4 MLJ 55; *Kundang Lakes Country Club Bhd v. Garden Masters (M) Bhd* [1999] 2 CLJ 633; *Trans-Summit Sdn Bhd v. Chun Nyook Lin* [1996] 3 CLJ 502).

The grounds adverted to as per the relevant document supplied by the defendant when filing the caveat inextricably connects the application to the JVA. Exhibit A3, which is the relevant caveat application form and verified by its solicitor, supplies the reason for it in the following manner (interpreted from the Malay language):

> (a) We have executed a letter of agreement dated (Joint Venture Agreement) with the owner TAIPAN FOCUS SDN BHD. (368001-P), a company incorporated under the Companies Act 1965 in Malaysia, and having an office at 26-A, Jalan Sireh, 41050 Klang, Selangor Darul Ehsan to develop the land in the manner set out at the Schedule in accordance with the conditions agreed upon in the Joint Venture Agreement. Among the conditions are:
>
> i. the landowner is not to sell, mortgage, transfer the relevant land or transact the land in any form;
>
> ii. part of the buildings built on the said land stated in the Joint Venture Agreement is owned by BAIDURJ PJ SDN BHD (12645-D).
>
> (b) The caveat is to protect our interest.
>
> (c) The Statutory Declaration is enclosed.

The statutory declaration affirmed pursuant to the Akta Akuan Berkanun 1960 by one Yeoh Choo Hor, a solicitor of the High Court Malaya, had verified the above reason. What could not be denied was that the ground supplied for the caveat application was the JVA executed by both parties. Subsequently the JVA was mutually terminated on 8 March 2002, followed by a letter from the plaintiff requesting the defendant to immediately remove all encumbrances, and any caveat that had been entered over the land.

In the course of the submission, the defendant had vented two additional grounds to support its contention why that caveat should remain. The two were that there was another active caveat at the sideline filed by a third party, and secondly, this land was the cause and source of three pending suits. As far as the defendant was concerned, even if the defendant's caveat were removed, the situation would not change, due to the injunctive effect of the other caveat. Further, according to the defendant, by all logic with so much controversy surrounding the impugned property, and to avoid unforeseen problems *status quo* should be maintained.

By virtue of all the above earlier reasoning, first I am not inclined to consider the interest of the defendant, which comes in the form of the JVA and debt-related matters, as a caveatable interest. Secondly the other two grounds, whether singularly or combined must fail the statutory test. To submit to these additional grounds of protestation would violate the current stable law and replace it with imported uncertainty. In other words, this was the perfect example of the defendant attempting to distract my attention from the precariousness of its authority, by throwing these two red herrings across my path.

It has to be appreciated from the point of view of the plaintiff that, unless it eliminates all the prohibitions over the land, whether caveat by caveat or case by case, it will never be able to successfully exploit the land in any manner. The plaintiff has to start sometime. It has to resort to self help and certainly no one within sight is offering any help to put it back on track. The latter's action, which also qualifies as a mitigation action for future reference, does not contravene any known law either. Moving on from there, as the defendant has failed to pass the first hurdle ie, the issue of caveatable interest, it is thus unnecessary for me to consider the other hurdles, namely the issues of 'serious question to be tried' and 'balance of convenience'. Even if I want to, regretfully I fail to find that 'serious question to be tried' for consideration.

On the above grounds I therefore grant the application and order with costs that the caveat be lifted.